92-1561

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RENSSELAER CENTRAL SCHOOL CORPORATION,
Petitioner,

v.

JOSHUA H. BERGER and MORIAH H. BERGER,
b/n/f ALLEN H. BERGER,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A school district in Indiana adopted a written policy opening its elementary and high school campuses twenty-four years ago to community groups who wished to speak to and/or distribute their literature to students during school hours. Over the years representatives of several varied groups spoke to students and distributed literature, including local members of the Gideons International. Though the brief, non-proselytizing message and literature distribution by the Gideons passed Constitutional muster with the district court, the circuit court found the failure of the school corporation to censor the religious speech to be an Establishment Clause violation.

1. Did the Seventh Circuit err in holding that the school corporation's community literature distribution and access practices violated the Establishment Clause, based on its virtually exclusive reliance on a case in which this Court strictly limited the holding to overt, formal and explicit "religious exercises", which are not present in this case?

2. Did the Seventh Circuit err in holding the school corporation's policy and practices to be violative of the Establishment Clause in that the state in the instant case: 1.) did not decide that the questioned activity would occur; 2.) nor choose the speaker to give the questioned message; 3.) nor determined or counseled the content of the message.

3. Is the Seventh Circuit Court's opinion, which mandates discrimination against private religious speech, in conflict with the opinions of this Court concerning non-public fora?

4. If the Seventh Circuit's opinion is allowed to stand, would it not serve to erect an absolute wall of separation between students in state-run schools and religious persons with religious messages and values, contrary to the opinions of this Court?

PARTIES

The names of all of the parties to the proceeding in the court below appear in the caption of the case.*

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* The Rensselaer Central School Corporation is a unit of government in Indiana. Consequently, it has no parent or subsidiary companies.

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DECISIONS BELOW

The decision of the court of appeals is reported as *Berger v. Rensselaer Central School Corporation*, 982 F. 2d 1160 (7th Cir. 1993). The decision of the district court granting summary judgment is reported as *Berger v. Rensselaer Central School Corporation*, 766 F. Supp. 696 (N.D. Ind. 1991).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment in this case on January 5, 1993, with an Order amending opinion entered on February 17, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

The regulations of the Rensselaer Central School Corporation governing the distribution, display or exhibit of materials on the campuses of the school corporation from persons and groups in the community are set forth in Appendix D (App. 46a).

STATEMENT OF THE CASE

This is a case about content and viewpoint-based censorship of private religious speech from a forum opened by the school corporation to speakers from the community and for the distribution of literature by persons from within the community. It does not involve a "religious exercise" as that term has been used by this Court.

Petitioner Rensselaer Central School Corporation (hereinafter "Rensselaer") adopted a policy in December, 1969 by which it allows various persons, groups or organizations from the community to distribute, display or exhibit materials in the various schools within the school district. The policy is content neutral and makes no reference to the religious content of materials distributed. Under the policy a number of varied community groups have distributed materials on the Rensselaer campuses, including local members of Gideons International (hereinafter "Gideons"). Respondent Berger, a parent of children in the school system, sought injunctive and declaratory relief under 42 U.S.C. § 1983, which was denied in the district court, but essentially granted in the circuit court of appeals. Accordingly, under the circuit court's opinion the school corporation must now censor messages given and literature to be distributed by private persons from the community on school campuses, based purely upon the religious content of the private speech.

A. Statement of Facts

The Rensselaer Central School Corporation owns and operates public schools in the City of Rensselaer located in Jasper County, Indiana, a rural county in northwest Indiana. In December, 1969 Rensselaer adopted a policy entitled Distribution, Display or Exhibition on School Property. (App. 46a). The policy provides for access to distribute literature on "school corporation premises" by "persons, groups or organizations" from the community.

Under this policy Rensselaer's classrooms have been opened, during class hours, to various speakers from the community and to a diverse assortment of printed literature from private citizens of the community distributed to Rensselaer's students:

A. Speakers from the following community groups have addressed students in Rensselaer's classrooms:

1. 4-H;
2. Boy Scouts of America;
3. Tri-Kappa Sorority;
4. The Gideons; and
5. Other unnamed groups.[1]

B. 4-H, Boy Scouts of America, Girl Scouts of America, Summer Athletics and other unnamed groups have distributed parent permission forms for participation in their various youth activities in the classroom.

C. A book from a "variety of businesses" in Rensselaer promoting good citizenship, responsibility, earning others' trust, the dangers of drug use, honesty, tenacity and gratefulness has been distributed in Rensselaer's classrooms.[2]

D. Rensselaer made literature available to students to participate in "Readathons" (sponsored by the University of Notre Dame), "Marathons" and the Daughters of American Revolution History Essay Contest.

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[1] School Corporation Superintendent Dinsmore stated in her deposition that ". . . the 4-H, the Boy Scouts and et cetera have been allowed to *speak* to students . . . this last year Tri-Kappa had an art activity content, if you will, for the elementary students, and they came in and explained the procedure and et cetera." (Emphasis added)

[2] The book entitled, *The Way To Go*, was presented to Rensselaer School students by McDonald's of Rensselaer, Bank One Rensselaer, NA, Betty Williams and Associates, Tillett Engineering Services, Inc., Jackson Funeral Home and Steffen's Jewelry.

E. Religious literature from sources other than the Gideons was distributed in the Rensselaer school system in the past, including a book entitled *Young People of the Bible*, distributed by In Jesus' Love Foundation, Inc. of Rensselaer, along with two local businesses.

F. For as long as anyone can remember, but probably beginning in the fifties, Rensselaer has allowed the distribution of religious literature by local members of the Gideons International.

Religious literature distributed by the Gideons in the Rensselaer School System was generally distributed only after parents received parental permission slips. However, after 5th grade classes were combined in the Middle School in the years of 1986, 1987 and 1988, permission slips were not used. Parental permission slips for the receipt of Bibles were a regular policy and practice in the years 1980-1985 while fifth grade students were still at the Monnett Elementary School. Prior to, as well as after the parental permission slip policy went into effect, Gideon representatives would tell each child that they would have to take the literature home to their parents and ask permission to keep the literature, otherwise the literature was to be returned.

In the most recent three years (1986, 1987 and 1988) of distribution of religious literature under Rensselear's policy, the Gideons distributed religious literature in two of those years *outside* of the classroom (1986, 1987). In 1986 religious literature presented by the Gideons was "placed on a table in the hallway outside (the principal's) office".

In 1987 religious literature presented by the Gideons was placed in a box "inside the gymnasium door" for students to obtain a copy as they left the gymnasium. In both years of literature distribution in or near the hallway, 1986 and 1987, fifth grade students first assembled in the gymnasium of the school to hear a brief

presentation by Gideon members.[3] After the presentation, students in 1986 could walk, if they so chose, to the office area of the school and obtain a copy of the religious literature from a box in the hallway, or in 1987 they could walk to the box at the doorway of the gymnasium to obtain a copy. Consequently, religious literature distribution by the Gideons in the actual *classrooms* of the school corporation in the six years since 1985 only occurred in one year, 1988.

Rensselaer Superintendent Dinsmore testified that religious literature was never "passed out" to Rensselaer students:

> "One was that the books were never passed out to the students—and that term is used consistently—but rather the students obtained them by coming forth or going someplace else to pick up the particular books. . . No one led students to the books, passed books out, or any thing of the sort." [4]

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[3] All deponents testified that the Gideons spoke very briefly, usually "thirty seconds to a minute" (Superintendent Dinsmore); "thirty seconds" (Teacher Brooks); "a minute and a half or a couple of minutes" (Principal Lewis).

[4] In the "delicate, fact-sensitive" area of Establishment Clause jurisprudence the individual facts are obviously relevant. In the circuit court's January 5, 1993 slip opinion the court erroneously wrote that "after the presentation, the students were lined up and instructed to take a Bible from a stack sitting on a table or desk." In its Order amending its opinion (App. C, p. 44a), following the filing of a Petition for Rehearing, the circuit court removed the words "lined up and" so that the sentence now reads, "after the presentation, the students were instructed to take a Bible from a stack of Bibles placed on a table or desk." (App. 8a) However, even with the deletion of the clearly erroneous phrase "lined up and", which is nowhere in the record, the circuit court's factual conclusion remains flawed. *No one "instructed" students to take Bibles*, neither the teacher, who was silent, nor the Gideons who stressed the voluntary, parentally-approved nature of the literature distribution. The district court's analysis of this factually crucial part of the case was that though the classroom teacher was present, she "observed silently from another part of the room". (App. 28a) The district

Superintendent Dinsmore testified that distribution of material under the policy, whether religious or not, was all done "outside the instructional time." Testifying that the school is guided by State Department of Education Guidelines, Superintendent Dinsmore stated that the School Corporation has additional minutes in each day outside of instructional time which may be used for community speakers or community literature distribution.

In the only year in the last six years in which religious literature was distributed by the Gideons in Rensselaer classrooms, a teacher who was present at the time of the distribution summarized what occurred in the following manner:

> "The Gideons came to the classroom with a box of Bibles, put the box on the first desk inside the door, explained to the children who the Gideon organization was, what the Gideon organization is and does, and told the children that if their parents would not object they would be allowed to take a Bible."

Teacher Brooks noted that she didn't know if all of the children accepted a Bible "because I didn't pay attention and I did not sort out those who did not." She testified that "I played no role" in the distribution of religious literature in her classroom. All of the witnesses testified that there was no scripture taught by the Gideons and no proselytizing efforts made by Gideon representatives in the classroom.

Teacher Brooks also testified that literature from other organizations, besides the Gideons, had been distributed by organizations in the classrooms. She acknowledged that

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court found that the only representative of the state in the classroom, the teacher, took *no* action in regard to the literature distribution, "at no time would the teacher say anything, or participate in the handing out of Bibles." (App. 28a) Thus the state could hardly be said to have forced any given activity by any student, because the state stood silent, for this distribution, as well as for other literature distribution by other community groups.

the book *The Way To Go* had been distributed in 1988, and to some classes in 1989. Likewise, Principal Lewis acknowledged that the book *The Way To Go* had been distributed in his school.[5] Respondent Allen Berger testified that a book entitled *Young People of the Bible* had been distributed in the Rensselaer School System, not by the Gideons, but instead by a group entitled "In Jesus' Love Foundation of Rensselaer, Indiana." However, neither Berger child ever received a copy of either *The Young People of the Bible* or a copy of a Gibeon Bible on school corporation premises.

B. Course of Proceedings

This action was initiated in federal district court by Allen H. Berger on May 15, 1990 on behalf of his two minor children, Joshua H. Berger and Moriah H. Berger ("Berger"), who were then enrolled as students in the first and fifth grades in the Rensselaer Central School Corporation. In his initial action Berger sought a declaratory judgment, as well as preliminary and permanent injunctive relief. Specifically, Berger challenged Rensselaer's community literature distribution and access policy adopted in 1969 (App. D). Berger challenged Rensselaer's granting of access to classrooms within the school corporation for community speakers and for the distribution of community literature which was of a religious nature.

Following discovery and briefing on the issue of whether a justiciable controversy existed giving Berger

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[5] An examination of the contents of *The Way To Go* discloses that the book promotes general principles of morality and right living. Indiana statutory law (I.C. 20-10.1-4-4) mandates the public schools of Indiana to teach "honesty, morality, courtesy, obedience to law, respect for the national flag, the Constitutions of the United States and Indiana, respect for parents and home, the dignity and necessity of honest labor and other lessons of a steadying influence which tend to promote and develop an upright and desirable citizenry."

standing to sue, the district court on June 22, 1990 ordered the parties to brief the substantive first amendment questions raised in Berger's amended complaint. The district court then proceeded to conduct a hearing on October 19, 1990 on the parties' cross-motions for summary judgment.

On May 7, 1991 the district court found in favor of Berger on the question of standing initially raised by Rensselaer. (App. B, p. 24a) However, the district court denied Berger's petition for declaratory and injunctive relief and held that Rensselaer's community literature distribution and access policy did not violate the Establishment Clause of the First Amendment to the Constitution of the United States of America. The district court found that ". . . the regime in Rensselaer under which these materials are made available to students does not run afoul of the First Amendment's Establishment Clause."

The district court applied this Court's Establishment Clause jurisprudence as found in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) and concluded that Rensselaer's content-neutral policy violated none of the three prongs of the *Lemon* test, as modified. As to the first prong, i.e., a secular purpose for the policy, the district court held that the Rensselaer policy was "motivated by at least one of many possible secular concerns." (App. 40a) As to *Lemon*'s second prong, the effect of the policy, the district court held that:

> "The court finds that no observer, Christian adherent or not, could reasonably view the Gideon organization's distribution of Bibles in the Rensselaer schools as an endorsement of the Christian faith. Permitting the local Gideons to circulate their literature in public school classrooms is no more an endorsement of Christianity than allowing little league baseball to disseminate its materials endorses the national pastime. Nor would a reasonable observer perceive a similar leaflet campaign by the American Civil Lib-

> erties Union or the Anti-Defamation League of B'nai B'rith as an endorsement of the respective views of these organizations . . . [i]n this case, *where the Bibles emanated not from the teacher but from a private actor, who did not engage in a proselytizing recitation of scripture and verse, but merely invited each student to take a Bible and read it, the court finds that no message of official endorsement resulted.* The defendant's policy offering school students exposure to the many facets of their local community (including the religious) does not constitute the school's imprimatur as to each such facet." (App. 41a-42a, emphasis added)

Under the third *Lemon* prong the district court held that any level of "school involvement with the Gideon's distribution of Bibles is merely incidental and does not rise to the level of an 'excessive entanglement' with religion." (App. 43a)

The district court observed that if the Bergers were:

> "to have their way, the Rensselaer School System would exclude only religious groups from access to its classrooms. All other groups seeking permission to distribute their literature would be welcomed. In such a case, could an observer conclude other than that the purpose of the exclusion was to *disapprove* of religion? Such a purpose would be manifestly hostile to religion generally and thus run afoul of the first *Lemon* prong. The school system's policy permitting the dissemination of literature of many local groups, whether of a religious affiliation or not, thus cannot reasonably be said to be an endorsement of any particular secular or religious viewpoint." (App. 42a, emphasis by the court)

Respondent Berger appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit. On January 5, 1993 the circuit court reversed the entry of summary judgment against Berger. *Berger v. Rensselaer Central School Corporation*, 982 F. 2d 1160 (7th Cir. 1993) (App. A, p. 1a).

In its opinion the circuit court noted that briefs in the case before the circuit court had been filed eighteen months prior to the January, 1993 opinion, but that oral argument had been postponed because of the pending case before the United States Supreme Court of *Lee v. Weisman*, ——— U.S. ———, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992). The circuit court noted that the briefs of both parties, as well as *amici* submissions, anticipated that this Court would likely render an opinion in *Lee* which would have some significant impact on the pending case. The circuit court stated that "as a result" of the decision of this Court in *Lee* it arrived at its opinion, citing *Lee* no less than twenty-six times in its opinion. The circuit court held that its understanding of precedent, "and in particular *Lee* itself, compel(s) us to reverse the district court's decision sanctioning the Rensselaer Central School Corporation's policy toward the Gideons" (App. 19a). Though the circuit court briefly referred to this Court's holding in *Lemon*, its opinion frequently cited this Court's holding in *Lee* as leading the circuit court to the conclusion that the Rensselaer policy failed to pass Constitutional muster. The Court specifically stated the basis of its opinion when it observed that "in so holding, we have taken our lead from *Lee* and not relied on the structure of *Lemon*" (App. 22a).

The circuit court failed to set forth in detail how the state, i.e., the Rensselaer Central School Corporation, itself, either through its policy or practice violated the First Amendment. The circuit court even held that ". . . we are confident that the school district's policy is not aimed at promoting the religious values of the Gideons . . .", but the circuit court failed to identify any governmental interest—compelling, substantial, or even rational —which allegedly supported the exclusion of private speakers from government facilities, solely on the basis of the religious content or purposes of the private speech.

REASONS FOR GRANTING THE WRIT

This case presents the question as to whether or not a public school district which opens its campuses generally to non-school community groups to speak to and distribute literature to students, may deny permission to particular community groups based solely upon the religious content of their message.

This case presents a classic instance of the misapplication of a "delicate, fact-sensitive" holding in one case to a widely different factual setting in another. In *Lee* an "overt," "formal," "explicit religious exercise" was found to be violative of the Constitution's Establishment Clause, this Court holding that the "sole question presented is whether a religious exercise may be conducted" if students are induced to conform to or "participate in a religious exercise." The instant case presents *no* "overt", nor "formal", nor "explicit religious exercise" of any nature. Thus, the circuit court's virtually exclusive reliance on *Lee* is misplaced.

This case further presents the question to this Court as to whether the circuit court exceeded and misapplied the holding of this court in *Lee* as to the involvement of a school district with non-school community persons. Unlike *Lee*, in this case the state did not decide to conduct or allow a Bible distribution; did not select the person or persons to conduct the distribution; and did not instruct nor counsel the non-school community group as to the content of the message to be presented to students. The decision by the circuit court appears to be contrary to the conclusion of this Court in *Lee* in which this Court held that:

> A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. (Citing *Abington School District v. Schempp*, 374 U.S. 203 (1963)). We recognize that, at graduation time and throughout the course of the educational process, there

> will be instances in which religious values, religious practices and religious persons will have some interaction with the public schools and their students." (Citing *Westside Community Bd of Ed. v. Mergens*, 496 U.S. 2266 (1990) (120 L. Ed. 2d 467, 488).

The decision of the circuit court conflicts with the prior decisions of this Court concerning non-public fora. By opening its campuses to community groups and associations, Rensselaer created a limited public forum. Control over access to a non-public forum can be based on subject matter or speaker identity, but must be viewpoint-neutral. Any attempt to exclude speech on the basis of its religious nature is viewpoint-discriminatory, and thus improper.

The circuit court, post *Lee*, would appear to be holding that there must be a complete extirpation of any religious contact by private religious persons from the community with their community's students. This holding would erect an absolute wall of separation between public students and religious persons from the community, and is, consequently, in conflict with the ruling of this Court in *Lee*.

Therefore, this petition for writ of certirorari should be granted under both parts of Supreme Court Rule 10.1(c), in that the circuit court decided a federal question in a way that conflicts with applicable decisions of this court; and further, that this case presents an important question of federal law which has not been, but should be, settled by this Court. This case appears to be a case of first impression in this Court as to the Constitutionality of the distribution of Bibles in public schools. This is a question which has been decided in conflicting ways by state and federal courts across the country.[6]

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[6] "Thus, certain courts in some jurisdictions support the view that Bible distribution in public schools may be permissible[], while the courts in other jurisdictions have concluded that general

I. THE DECISION OF THE SEVENTH CIRCUIT HOLDING THAT THE SCHOOL CORPORATION'S COMMUNITY LITERATURE DISTRIBUTION AND ACCESS PRACTICES VIOLATED THE ESTABLISHMENT CLAUSE IS IN ERROR IN THAT THE DECISION OF THIS COURT UPON WHICH THE CIRCUIT COURT PRIMARILY RELIED WAS STRICTLY LIMITED TO OVERT, FORMAL AND EXPLICIT RELIGIOUS EXERCISES, AND THUS DOES NOT APPLY TO THIS CASE.

As noted above, the Seventh Circuit Court of Appeals rested its opinion almost exclusively on the opinion of this Court in *Lee v. Weisman*, —— U.S. ——, 112 S. Ct. 2649, 120 L. Ed. 2d 467. Though the circuit court referred in passing to this Court's holding in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, its frequent citation of *Lee* and its failure to examine any one of *Lemon*'s three prongs, or for that matter the endorsement doctrine arising under *Lemon* (see Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984)) leads to the conclusion that the circuit court quite accurately stated the basis of its opinion when it observed that "in so holding, we have taken our lead from *Lee* and not relied on the structure of *Lemon*." (App. 22a)[7]

Rensselaer would respectfully assert that the circuit court's reliance on *Lee* is misplaced. This Court in *Lee* concluded its opinion by specifically holding:

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distribution of Bibles to students is impermissible" (111 A.L.R. Fed. 135). Though these opinions are not differing opinions between federal courts of appeal, they do present differing interpretations of an important federal question.

[7] The district court however dealt extensively with the three prongs of *Lemon* and concluded that the Rensselaer policy and practices did not violate any of the three prongs of *Lemon*, nor the modified endorsement test under *Lemon*. (App. pp. 37a-43a)

> The *sole question* presented is whether a *religious exercise* may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a *religious exercise*. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment. (120 L. Ed. 2d 467, 488, emphasis added.)

Because the circuit court relied virtually exclusively on *Lee*, and because this Court in *Lee* specifically limited the application of *Lee* in this "delicate, fact-sensitive" area of the law to whether a "religious exercise may be conducted", that then leads to an examination of this Court's use and imputed meaning of the phrase "religious exercise."

The "religious exercise" referred to in *Lee* consisted of the giving of an invocation and a benediction at a middle school graduation ceremony. The invocation and benediction involved the audience standing during the Rabbi's prayers, or remaining in silence. In *Lee* this Court found that the "state officials direct(ed) the performance of a formal religious exercise" (120 L. Ed. 2d 467 at 480). This Court found that the prayers (prayer being mentioned 42 times in the decision) constituted an "explicit religious exercise" (p. 487); a "formal religious exercise" (p. 480); an "overt religious exercise" (p. 481); a "formal exercise" (p. 483); a "prayer exercise (3 times)" (pp. 484, 487); and a "religious practice" (p. 484). In fact, this Court used the phrase "religious exercise", in several variants, no less than twenty-three (23) times in *Lee*. Consequently, one must then be struck by the limitation placed upon *Lee* by this Court by which this Court limited the application of *Lee* to "religious exercises."

Therefore, the point of relevant inquiry becomes what action or activity took place in the Rensselaer schools

which could in any meaningful sense be described as a "religious exercise"? In the instant case the record is without contradiction that the Gideon representatives availed themselves of the Rensselaer literature distribution policy (App. 46a) by speaking briefly to fifth grade classes in Rensselaer's Middle School in the autumn of the school year. The record confirms that the presentation given by the Gideons was relatively short, *i.e.*, the shortest estimate of time being thirty seconds and the longest estimate of time being two minutes. The circuit court described the actions of the Gideons in this way:

> "They spoke for a minute or two *about their organization*—their exact statements are not in the record —and offered up a painful pun that the books, the covers of which were red, were meant to be read." (App. 8a, emphasis added)

The circuit court further noted that "the teachers, though present, did not participate in handing out the Bibles" (App. 8a). The court further found that students were "frequently told to take the publications home to their mothers and fathers and to return the books to their teachers if their parents objected." (App. 8a).

This simple activity then appears to constitute the objectionable action which the circuit court found violated the Establishment Clause, i.e., that private religious speakers from the Rensselaer community visited Rensselaer campuses once a year to distribute Bibles[8] and to speak for a brief period of time "about their organization." The record confirms that none of the statements made by these private religious speakers to Rensselaer students were proselytizing in nature.

Therefore, the conclusion by the circuit court that *Lee* must determine the outcome of this case must be seen as

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[8] The circuit court did not specify which religion, i.e., Christianity or Judaism, was established by the questioned action. The "Bibles" distributed by the Gideons contained not only the text of the New Testament (Christianity), but also the text of Proverbs and Psalms from Judaism's sacred texts.

erroneous. *Lee* by its facts, as well as the specific holding stated by this Court, *only applies to an "explicit"*, "formal", or "overt religious exercise." Obviously, prayer is such an exercise. However, can one seriously argue that a statement by a private religious person as to one's "organization" and the distribution of religious material constitutes a "religious exercise?" A disinterested observer, upon analysis of this Court's opinion in *Lee* could come to an understanding as to the concern that this Court had with the actions by the school officials in Providence, Rhode Island regarding persons who were in attendance at a graduation ceremony who may have felt pressured into either participation in a "religious exercise" or "embarrassment" as to the religious exercises taking place in their presence. However, those are just not the facts in this case. The voluntary distribution of a Bible by a private speaker cannot in any meaningful sense be held to be a *religious exercise*, in the same meaning as prayer or Bible reading, or verse recitation, or any other liturgical or proselytizing activity would be construed to be a "religious exercise." In fact, the district court found that the Gideons "did not engage in a proselytizing recitation of scripture and verse" (App. 42a).

The district court held that Rensselaer's written policy could be viewed as a trespass regulation controlling access by non-school persons or groups onto school campuses during school hours, "or it could be viewed as a program to make available to students locally generated literature reflecting many aspects of their community—civic, athletic, historic, as well as religious." (App. 40a). Interestingly, neither the district nor circuit court found that the brief, non-proselytizing activities by the Gideons constituted a "religious exercise" as barred under this Court's holding in *Lee*.

This Court in *Lee* clearly stated that the intention of the opinion in *Lee* was not to prohibit the involvement of religious persons with public schools:

> We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. (See *Westside Community of Ed. vs. Mergens*, 496 U.S. 226 (1990).[9]

Because the circuit court failed to set forth in any detail the basis upon which Rensselaer's activities violated *Lemon*, or any other Establishment Clause case (except *Lee*) handed down by this Court; and because the circuit court's opinion was based upon *Lee*, but failed to distinguish the critical difference between a religious exercise as proscribed by *Lee* and mere literature distribution; therefore the circuit court's opinion is left without any significant jurisprudential foundation and must be reversed.

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[9] In Justice Souter's concurring opinion in *Lee* (joined by Justices Stevens and O'Connor) Justice Souter notes his understanding of the holding in *Lee*, which sounds very much like it could have been crafted for the instant case. Souter wrote in footnote 8 (120 L. Ed. 2d 467, 508) of his concurring opinion that "If the state had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message it would have been harder to attribute an endorsement of religion to the state . . . But that is not our case. *Nor is this a case where the state has, without singling out religious groups or individuals, extended benefits to them, as members of a broad class of beneficiaries defined by clearly secular criteria.* (citing *Widmar v. Vincent*, 454 U.S. 263, 274-275 (1981) and *Walz v. Tax Commissioners*, 397 U.S. 664 (1970), in which Justice Harlan stated: 'In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.' " (Emphasis added)

II. THE DECISION OF THE SEVENTH CIRCUIT HOLDING THE SCHOOL CORPORATION'S POLICY AND PRACTICES TO BE VIOLATIVE OF THE ESTABLISHMENT CLAUSE IS IN ERROR IN THAT THE STATE IN THE INSTANT CASE NEITHER 1.) DECIDED THAT THE QUESTIONED ACTIVITY WOULD OCCUR; 2.) NOR CHOSE THE SPEAKER TO GIVE THE QUESTIONED MESSAGE; 3.) NOR DETERMINED OR COUNSELED THE CONTENT OF THE MESSAGE.

Only two circuit courts have applied *Lee* since it was handed down by this Court in June of last year. Besides the holding by the Seventh Circuit Court of Appeals below, *Lee* has also been construed by the Fifth Circuit Court of Appeals in *Jones vs. Clear Creek Independent School District*, 977 F. 2d 963 (5th Cir. 1992). What is interesting about these two cases is the wide divergence of application of *Lee* by the two circuit courts. In the instant case, the Seventh Circuit seems to have held that *Lee* requires the extirpation of any religious message by a private religious speaker having any contact with students. On the other hand, the Fifth Circuit Court in *Clear Creek* held that "religious thoughts should not be excluded as irrelevant to public education" and correctly noted the holding by this Court in *Mergens* in which the plurality of this Court stated that:

> ". . . there is a crucial difference between *government* speech, endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."

Rensselaer would submit that the Seventh Circuit Court's holding is in contravention of the essential holding of this Court in *Lee*, i.e., that the *state* must "direct and control" religious speech in order to violate the Establishment Clause. In *Lee* the state decided that religious activity would occur, when the school principal made a decision to have prayer at the school function.

In the instant case the state has never decided that religious activity would occur; instead adopting a content-neutral policy (App. 46a) in which religion is in no instance mentioned. In *Lee* the state selected the religious speaker, the principal having chosen the Rabbi who would give the prayer. In the instant case Rensselaer has never chosen any persons who would enter its campuses and address students. The fact that the local members of the Gideons chose to enter the campus was a decision made by the Gideons, and not by the state. In *Lee* the state advised the speaker as to the content of the prayer to be given by providing a pamphlet with guidelines on prayers at such events. In the instant case the state gave no advice nor counsel to any of the various groups or associations who spoke on the campuses as to the content of their material.

Rensselaer did not advise representatives of 4-H, Boy Scouts of America, Tri-Kappa Sorority, Girl Scouts of America, Summer Athletics, Readathon, Marathon, Daughters of the American Revolution History Essay Contest, nor the Gideons as to the content of their messages. Consequently, the circuit court's conclusion that Rensselaer has engaged in a "governmental foray into religious activity" is incorrect. Rensselaer's understanding of its role as a school corporation is that it may not censor speech based upon its content.

Rensselaer has extended benefits by its community literature distribution and access policy to all persons in the community who wish to come to its campuses without singling out religious groups or individuals, who have as members of a broad class of beneficiaries defined by clearly secular criteria under the school board's policy, decided to avail themselves of these extended benefits.

In *Clear Creek* the Fifth Circuit emphasized that its understanding of *Lee* was that the activity in question must be "government-mandated" or "state-initiated." The distribution of Gideon Bibles by community resi-

dents in the Rensselaer schools was neither government-mandated nor state-initiated. Rensselaer would respectfully submit that the Seventh Circuit Court of Appeals' interpretation of *Lee* was in error, emphasizing as it did, the action and activity of private speakers and concluding as it did, that Rensselaer must now censor and prohibit private speakers with a religious message from its campuses.

III. THE DECISION OF THE SEVENTH CIRCUIT MANDATING DISCRIMINATION AGAINST PRIVATE RELIGIOUS SPEECH CONFLICTS WITH THE DECISIONS OF THIS COURT CONCERNING NON-PUBLIC FORA.

Rensselaer maintains that in its December, 1969 community literature distribution and access policy it created a limited public forum under *Perry Educational Association v. Perry Local Educators Association*, 460 U.S. 37, 45-49, 103 S. Ct. 948, 954-957, 74 L. Ed. 2d 794. Though Rensselaer was under no obligation to open its school campuses and classrooms to the community, and though it is not under any obligation to keep them open for any set length of time, it is restricted by the same standards which apply to a traditional public forum as long as the designated public forum continues to remain a designated public forum. See *Perry*, 460 U.S. at 46.

This Court has concluded that "(c)ontrol over access to a non-public forum can be based on *subject matter* and *speaker identity* so long as the distinctions drawn are *reasonable* in light of the purpose served by the forum and are *viewpoint-neutral*." *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 806 (1985) (emphasis added). In addition, the *per se* exclusion of a religious perspective is *viewpoint-discriminatory*. *May v. Evansville-Vanderburg School Corporation*, 787 F. 2d 1105, 1114 (7th Cir. 1986) (discrimination against religious speech is restriction on a particular point of view). Had the Rensselaer written policy in-

cluded the statement that all speech from community groups would be welcomed, except for religious speech, the policy would be unconstitutional on its face, because it would be content-based. *Widmar v. Vincent*, 454 U.S. 263 (1981) and *Mergens* would lend credence to the concept that there is no reasonable basis for the *per se* exclusion of speech based upon its religious content by private parties in school facilities available for use by a variety of outside organizations.[10]

The Second Circuit in *Travis v. Owego—Apalachin School District*, 927 F. 2d 688 (2d Cir. 1991) held that the school district's conduct, regarding speech, once a limited public forum has been created, must be viewpoint-neutral. The court in *Travis* held that if a school district which has opened a limited public forum then censors and prohibits speech based upon its religious content, the Free Speech and Public Forum aspects of the First Amendment have been violated.

Consequently, Rensselaer would submit that the correct Constitutional question is one of Free Speech and Public Forum jurisprudence and not the Establishment Clause. This Court noted in *Mergens* that "(T)he proposition that schools do not endorse everything they fail to censor is not complicated" (p. 2372). Rensselaer has not endorsed religion in its content-neutral policy, it has not

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[10] The circuit court disparages the recitation of community groups and associations by Rensselaer which have entered the campuses under its policy. The circuit court referred to these as "a few isolated, irregular talks by groups such as the Boy Scouts, the 4-H club and a sorority". However, there is nothing in the record to indicate as to how regular or irregular were the speeches given by various community associations. The record is silent on this point. Consequently, the court was incorrect in arriving at this conclusion. In addition, the point obviously is that under the content-neutral policy adopted by Rensselaer, a significant number of groups, of various types and with different interests, have appeared on the campuses and distributed their literature. The circuit court failed to give any jurisprudential basis for its opinion that the number was too "few" to meet Constitutional standards.

established a religion in its practices, and, in fact, has an obligation *not* to discriminate against religious speech in circumstances in which secular speech would be allowed, such as the use of its campus facilities by various community groups, as set forth in detail above.

IV. THE DECISION OF THE SEVENTH CIRCUIT, IF ALLOWED TO STAND, WOULD ERECT AN ABSOLUTE WALL OF SEPARATION BETWEEN STUDENTS IN STATE-RUN SCHOOLS AND RELIGIOUS PERSONS WITH RELIGIOUS MESSAGES AND VALUES, CONTRARY TO THE OPINIONS OF THIS COURT.

The circuit court's opinion, if allowed to stand, would strike at the very heart of this Court's Establishment Clause cases in which the Court has promoted "pluralism" and decried efforts by some to force the state to remove all traces of religion from public life. Justice Douglas in *Zorach v. Clauson*, 343 U.S. 306 (1952) emphasized that when the state encourages religious activities "it follows the best of our traditions." He noted that there is no requirement in the Constitution that the state "show a callous indifference to religious groups." (p. 658). Justice Goldberg, joined by Justice Harlan, wrote in *Abington School District v. Schempp*, 374 U.S. 203 (1963):

> "It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can only lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, *but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.* Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it." (p. 306—emphasis added).

Justice Berger in *Walz v. Tax Commissioner*, 397 U.S. 664 (1970) wrote:

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts *there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.*" (397 U.S. at 669—emphasis added).

Rensselaer would submit that neither its policy nor its practice by which it has opened its campuses to members of the community is a sponsorship nor an establishment of religion. On the contrary, Rensselaer would submit that the circuit court's opinion requiring it to prohibit speech coming on to its campuses under its literature distribution and access policy is hostile to religion, would constitute censorship and would itself be a violation of the First Amendment.

Rensselaer is concerned that should the circuit court's opinion stand, that the result would be the creation of "an absolute wall of separation" between its students and religious speakers with religious values and messages, sending "a clear message of disapproval", as Justice Kennedy warned in his dissent in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 106 L. Ed. 2d 472 (1989). Justice Kennedy warned against efforts to forbid all religious activity in public life as "a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause." (p. 657).

What else could the students of Rensselaer conclude from this locally well-publicized case, except that the government of their nation is about to allow any community group to address them in their classrooms and to give them literature, unless of course they are "religious" and therefore illegal, even unconstitutional, and thus, to be

scorned. The facts of this case confirm that no student was ever coerced to support or participate in any religion or its exercise. No religious exercise took place in which a student was required to participate, nor is there anything in the record to show that any student was coerced into engaging in any activity of any sort whatsoever. The mere invitation to students by a private speaker to accept, or for that matter reject, literature distributed free by the private speaker, hardly constitutes either state action or a state imprimatur of the literature itself, as the district court found (App. 42a)

Contrary to the conclusion of the circuit court, Rensselaer would submit that its eleven year old students are quite capable of understanding that the school is not endorsing, nor promoting, let alone *compelling*, its students to enter into the various art contests, scouting activities, history contests, agricultural activities, Christianity or Judaism, club membership, or any of the other activities which it allows under its literature distribution and access policy.

CONCLUSION

For all of the reasons as set forth herein, and because of the Seventh Circuit's clear departure from the decisions of this Court, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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March 26, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-2279

JOSHUA H. BERGER and MORIAH H. BERGER,
b/n/f ALLEN H. BERGER,
Plaintiff-Appellants,

v.

RENSSELAER CENTRAL SCHOOL CORPORATION,
Defendant-Appellee.

Argued Oct. 21, 1992

Decided Jan. 5, 1993

Order Amending Opinion Feb. 17, 1993

Franklin A. Morse, II (argued), Barnes & Thornburg, South Bend, IN, Richard A. Waples, Indianapolis, IN, for plaintiffs-appellants.

Robert K. Skolrood, Nat. Legal Foundation, Virginia Beach, VA, John R. Price (argued) Indianapolis, IN, Jay A. Sekulow (argued) American Center for Law and Justice, Virginia Beach, VA, for defendant-appellee.

Joel H. Greenburg, Chicago, IL, Samuel Rabinove, American Jewish Committee, New York City, for amici curiae American Jewish Committee, Nat. Council of

Churches of Christ in U.S., Unitarian Universalist Ass'n, American Jewish Congress and Americans United for Separation of Church and State.

Richard E. Shevitz, Hopper, Wenzel & Galliher, Sheila Suess Kennedy, Rubin & Levin, Indianapolis, IN, Steven M. Freeman, Anti-Defamation League of B'Nai B'Rith, New York City, for amicus curiae Anti-Defamation League of B'Nai B'Rith.

Richard E. Shevitz, Hopper, Wenzel & Galliher, Sheila Suess Kennedy, Rubin & Levin, Indianapolis, IN, for amicus curiae Indiana Interreligious Com'n on Human Equality.

Richard J. Darko, Lowe, Gray, Steele & Hoffman, Indianapolis, IN, for amicus curiae Indiana State Teachers Ass'n.

Peggy M. Hodges, American Family Ass'n, Tupelo, MS, for amicus curiae American Family Ass'n, Inc.

Robert K. Skolrood, Brian M. McCormick, Nat. Legal Foundation, Virginia Beach, VA, for amicus curiae Nat. Legal Foundation.

Keith A. Fournier, American Center for Law and Justice, Virginia Beach, VA, for amicus curiae American Center for Law and Justice.

Before CUMMINGS, Circuit Judge, PELL, Senior Circuit Judge, and KAUFMAN, Senior District Judge.*

CUMMINGS, Circuit Judge.

People are accustomed to finding Gideon Bibles tucked in the drawers of their hotel rooms; much less frequently do they find them stashed in the desks of their public school classrooms. In Rensselaer, Indiana, however, representatives of Gideon International have distributed

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* The Honorable Frank A. Kaufman, Senior District Judge in the District of Maryland, is sitting by designation.

Bibles in the public schools—usually in classrooms—for so many years that no one can seem to remember when the practice began. Moriah H. Berger and her brother Joshua are students in schools operated by the Rensselaer Central School Corporation ("Corporation"). Moriah was seven years old and in the first grade at Monnett Elementary School in May 1990 when plaintiffs filed an amended complaint challenging the Corporation's association with the Gideons. Joshua was ten years old and enrolled in the fifth grade at Rensselaer Central Middle School. The father of these children, Allen H. Berger, brought this suit on their behalf seeking to have the Corporation's practice declared an unconstitutional violation of the First Amendment's directive that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The district court threw out the Bergers' suit on summary judgment.

Though briefs in this case were first filed eighteen months ago, oral argument was postponed because the Supreme Court had on its docket the case of *Lee v. Weisman*, —— U.S. ——, 112 S.Ct. 2649, 120 L.Ed.2d 467. It is clear from the tenor of the initial briefs of both parties as well as from the numerous *amici* submissions in our case that, among those who follow such trends, the Supreme Court had been expected to work a radical change in Establishment Clause jurisprudence to allow more state involvement with religion. Defendants quoted as an expert source none other than *The Washington Post* for the proposition that *Lee* might "lead to an historic ruling which would 'allow a greater role for religion in public life'" (defendant's brief at 25). Defendant's brief discussed the expected shift anxiously, almost gleefully, because the prevailing precedent, *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, was highly unfavorable to its position. However, the Supreme Court in *Lee* did not accept the invitation issued by the Solicitor

General and others to give the government greater freedom to inject religion into its activities and policies. *Lee*, —— U.S. at ——, 112 S.Ct. at 2655. Instead, the Court left *Lemon* untouched, and created an equally vigilant Establishment Clause precedent by outlawing the practice of Providence, R.I. public schools of inviting clergy to deliver nonsectarian prayers at graduation ceremonies.

As a result, we must continue to view with suspicion governmental forays into religious activity, particularly in the context of public schools. The relationship between the Corporation and the Gideons cannot survive this scrutiny. Under the principles enunciated in *Lemon* and *Lee*, the distribution of Bibles in Indiana schools offends the First Amendment of the Constitution, and we are compelled to reverse the district court, 766 F.Supp. 696.

I.

The Rensselaer Central School Corporation has a written policy allowing the superintendent of schools and the principal of a given institution to grant permission to members of the community who wish to distribute literature or other publications to students.[1] This policy ap-

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[1] The policy reads as follows:

5501.1 In the best interest of the student body, no person, group, or other organization shall distribute, display, or exhibit any book, tract, map, picture, sign, or other publication of any type on the Rensselaer Central School Corporation premises unless authorized by the superintendent and the building principal.

5501.2 Approval for the distribution, display or exhibit of any materials by any persons, group, or organizations not sponsored by the school must be cleared 72 hours (three (3) school days) in advance of any distribution, display, or exhibit through the superintendent and the building principal[']s offices. If permitted, the time and location of distribution, display, or exhibit is to be determined by the administration. * * *

5505.5 Any person, group, or organization not a part of the Rensselaer Central School Corporation[] that does not abide

pears to give a principal, in conjunction with the superintendent, total discretion to grant or deny access to school property. Yet the policy offers the principal and superintendent no guidance on how to exercise this discretion other than the general reminder to act in students' best interests. It does not tell school officials whether they may favor certain speakers because some messages are more appropriate for children than others. Nor does the policy tell the superintendent or principal whether presentations and distributions by non-school personnel may be made during times ordinarily reserved for instruction. The policy does not say, for example, whether school officials could allow a local clothes merchant into the classroom one afternoon to peddle this or that brand of jeans in place of the usual algebra lesson—or whether the principal's cousin could come in and hand out leaflets pitching his candidacy for mayor.[2]

By all accounts, such difficult cases did not arise in Rensselaer except for the distribution of Gideon Bibles, and there were no disputes under the policy until Mr. Berger protested to the Corporation that he did not think it appropriate for his children and other students to receive religious material in the public schools.[3] In 1985,

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by the above policy, at the request of school officials, shall be considered guilty of trespass and reported to local civil authorities.

5505.6 Questions concerning the distribution of materials on school premises that are not answered by the above policy shall be presented to the Board of School Trustees for clarification.

[2] It is a measure of the policy's flexibility that what could be considered a simple trespass statute has been used to allow a religious group to distribute Bibles during class time.

[3] The policy itself does not treat religion directly and, thus, on its face, raises no Establishment Clause concerns. The Bergers raised an as-applied challenge to the Corporation's practice of allowing Gideon representatives to distribute Bibles to fifth graders. This opinion uses "policy" and "practice" interchangeably to refer to the Corporation's actions toward the Gideons.

when Joshua was in the first grade, he and the other youngsters were given a publication called *My Favorite Book* that was published by the "Jesus' Love Foundation" in conjunction with several local shopkeepers. In the elder Berger's opinion, the book was nondenominational but religious in its treatment of citizenship and lifestyle. Though he expressed disbelief to his wife that such materials would be distributed in public schools, Mr. Berger did not protest to the Corporation. In 1989, however, Mr. Berger learned of the Rensselaer school policy permitting the Gideons to distribute Bibles (Berger dep. at 8-16, plaintiffs' app. at 323-331). On October 27, 1989, he sent a letter to Superintendent Roberta Dinsmore requesting an end to the practice. Mr. Berger, who is a professor of anthropology, said that the relationship between public schools and the Gideons "is in clear violation of constitutional principles mandating a separation of church and state" (plaintiffs' app. at 375). The letter was discussed at a meeting of the school board on December 19, 1989. The president of that body, in raising the issue for the first time, also pronounced its resolution by declaring that the board had decided not to alter its policy regarding the Gideons. According to the minutes of the meeting, the president said:

> "Around November 1, the Board of Education received a letter questioning the legality of allowing the Gideons to pass out Bibles to the 5th grade students. Since that time a great deal of research has gone into the subject. The Board has had contact with a number of organizations across the United States and has, through this contact, come to a conclusion. I will briefly mention some of the information which we received. First, there have been very few actual cases involving the Gideons['] distribution of Bibles in the Public Schools. * * * At this time it is illegal to pass out Bibles in New Jersey and the eastern part of Arkansas. The Supreme

> Court has heard none of these cases. An important fact is that none of these cases have any jurisdiction in our own State which is in the 7th Judicial Circuit. Therefore, our policy concerning distribution, display or exhibition of materials on schools premises remains unchanged."

(plaintiffs' app. at 531). The audience was then invited to speak; all but one person voicing an opinion supported the existing policy. *Id.* Nothing said by the citizen commentators prompted the school board to change its mind, and the president's remarks reprinted above represent the school board's only public discussion of this issue.

Though Mr. Berger's letter did not sway the school board, it did scare off the Gideons. According to a representative of the organization, its policy is to sidestep litigation by avoiding schools where it meets strong opposition (Kooy dep. at 8, plaintiffs' app. at 728). Thus the Gideons withdrew their offer to supply Bibles during the 1989-1990 school year, at least temporarily ending a practice that extended back thirty-five years or more. As a result, neither Joshua nor Moriah Berger actually received a Bible from the Gideons.[4]

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[4] Defendant argued in the district court that the Bergers did not have standing to challenge the school policy because neither Joshua nor Moriah had received Gideon materials. The practice had been to distribute Bibles to fifth graders. Because the Gideons canceled their offer to distribute Bibles during the 1989-1990 school year when Joshua was in the fifth grade, he did not receive religious literature, and Moriah is still several years shy of the fifth grade. The district court decided that plaintiffs did have standing—in large measure because, having affirmed its policy, the school board could renew the allegedly wrongful activity at any time. In fact, the principal of the Rensselaer Central Middle School refused to say in his deposition how he would treat further requests by the Gideons (Lewis dep. at 33-34, plaintiffs' app. at 651-652). Defendant does not challenge the district court's findings on standing in this appeal, and we need not reconsider the issue in any detail except to note that Judge Sharp decided the question correctly.

When the Gideons did distribute Bibles, they sent two representatives who came once a year after clearing a date with the principal. There was no set method of distribution. However, the men usually went to each of five classrooms of fifth graders, always during regular school hours. They spoke for a minute or two about their organization—their exact statements are not in the record —and offered up a painful pun that the books, the covers of which were red, were meant to be read. We take this to mean that the Gideons made at least some statements to students encouraging them to read the Bible. After the presentation, the students were instructed to take a Bible from a stack of Bibles placed on a table or desk. During certain years the Bibles were distributed not in classrooms but in the auditorium or gymnasium, or perhaps the hallway. On such occasions the fifth graders were assembled in the auditorium or gymnasium for the short presentation by the Gideons.

The teachers, though present, did not participate in handing out the Bibles. At times the principal also attended. The students were frequently told to take the publications home to their mothers and fathers and to return the books to their teachers if their parents objected. It is unclear from the record how often this happened, if at all, or by what mechanism the teachers returned Bibles to the Gideons. For some years the school asked students to obtain the signed permission of a parent before accepting a Bible. This practice ended several years ago. Neither the principal nor superintendant gave a reasoned explanation for abandoning permission forms. Apparently school officials did not expend much energy thinking about how the Gideons were to distribute Bibles, or the implications of that distribution. Indeed, a school board member told Mr. Berger that it had never occurred to him anyone might object, and indeed no one other than Mr. Berger ever complained about the relationship between Rensselaer schools and the Gideons (Berger dep. at 22, plaintiffs' app. at 337).

The Bibles given students in Rensselaer school contained the entire New Testament but only the books of Proverbs and Psalms from the Old Testament. One student testified by affidavit that the Bible she received contained a blank space for a signature under the written statement, "My Decision to Receive Christ as My Savior" (plaintiffs' brief at 11). In most other Bibles, however, the front page of the Bible merely had blank lines under "Presented to," followed by the Gideons' address in Nashville. The next page contained a red, white and blue drawing of an American flag and a quote from Proverbs 14:34: "Righteousness exalteth a nation: but sin is a reproach to any people." On the title page was the statement, "The New Testament of Our Lord And Savior Jesue Christ With Psalms and Proverbs * * * Commonly Known As The Authorized (King James) Version * * *." By all accounts, the Bibles were not used for pedagogical purposes. The teachers did not discuss religion in conjunction with the distribution, and the Bibles were not studied for their historical or literary value. They were presented simply as a gift from the Gideons to be read daily for personal enrichment.

The Gideons were not the only group to take advantage of the Corporation's open-door policy. According to defendant, the Boy Scouts, Tri-Kappa Sorority, the 4-H Club and other unnamed groups have at various times addressed students in Rensselaer schools (defendant's brief at 4-5). In addition, these groups and others circulated parental permission forms for participation in their extracurricular activities, and the Jesus' Love Foundation handed out a religious publication entitled *Young People of the Bible* in addition to the nondenominational *My Favorite Book*, which Joshua Berger received in the first grade (defendant's brief at 5-6). The record contains but one example of school officials exercising their discretion to deny access to outsiders. The superintendent rejected for unspecified reasons a poster

that was to be pinned on a bulletin board. The superintendent said in her deposition only that the poster was not what she had expected (Dinsmore dep. at 25-27, plaintiffs' app. at 451-453). Asked the sorts of presentations that would not be permitted in her schools, the superintendent said that she would exclude promoters of "satanism" because "we are responsible for protecting the moral being of the kids." The superintendent seemed to leave room for rejecting other groups as well. When questioned if "[i]n concrete, terms, other than satanists, is there any other religious oragnization or anti-religious organization that you can think of at this time that you would put in the category of those whose material you would not approve?" she said merely, "I do not know all their names, no" (Dinsmore dep. at 74-75, plaintiffs' app. at 500-501).

II.

Attempting a definitional coup, defendant tells us at page 15 of its brief that this is not, after all, a case about the Establishment Clause but a case about free speech. The issue is said to be the right of Gideons to freely express themselves by handing out Bibles to schoolchildren. Specifically, the Corporation suggests that Rensselaer schools created a designated public forum under *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-49, 103 S.Ct. 948, 954-957, 74 L.Ed.2d 794, by issuing an open invitation to speakers in the community to address schoolchildren. Having opened otherwise non-public property to expressive activity, the government is supposedly obliged to treat all speakers equally. To exclude the Gideons, then, would be to discriminate based on the content of their message (defendant's brief at 15-21). Under this analysis, we need not even consider whether the government has established a preference for one religion over another, or for religion in general, by overseeing the distribution of Gideon Bibles in classrooms for non-pedagogical purposes.

This approach suffers from two failings: it distorts the facts and misconstrues the law. It is factually wrong on two counts. First, the free speech argument presumes that the Corporation did not participate in the Bible distribution. In essence, this is an argument that the distribution of Gideon Bibles lacked state action. Under this view, the Corporation was merely a conduit or neutral non-participant through whose doors ideas could pass without changing or being changed by the schools' participation. Several key facts belie the schools' non-involvement. The Bibles were distributed by Gideons—it is true—but in public schools, to young children, in classrooms, during instructional time,[5] each year for several decades, in the presence of the teacher and often the principal, with instructions to return unwanted books not to the Gideons but to teachers. Defendant carefully notes that the distribution sometimes occurred in an auditorium as evidence that it was not part of a state-sponsored effort to indoctrinate students in the ways of the New Testament, presumably because distribution in auditoriums, as against distribution in classrooms, is less suggestive of state-sponsored Bible study. Yet the image of hundreds of students being marched into an auditorium for the yearly distribution of Bibles cannot but leave the imprimatur of state involvement. A ten- or eleven-year-old fifth grader cannot be expected to make subtle distinctions between speakers or instructors invited by the Corporation and those whose invitations are self-initiated, even assuming the children were told how the

[5] The superintendent contended that the Bibles did not take up instructional time because there are a few extra minutes built into the school day (Dinsmore dep. at 71-72, plaintiffs' app. at 497-498). While it is unquestionably true that there must be unbudgeted minutes in a school day, and that the short presentation by the Gideons did not necessarily replace other instruction, the important point is that the distribution occurred during regular school hours ordinarily reserved for teaching. We do not take the superintendent to mean that students and teachers would have sat in silence for that period had the Gideons not come to distribute Bibles.

Gideons arrived in their classrooms—and there is no evidence that they were so informed. *Lee v. Weisman*, —— U.S. ——, ——, 112 S.Ct. 2649, 2657 ("These concerns have particular application in the case of school officials, whose effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject"). It would be naive in the extreme to draw any conclusion in these circumstances other than that the Corporation was intimately involved if not downright interested in seeing that each student left at the end of the day with a Gideon Bible in his or her pocket.

The free speech argument also errs factually by depicting the Rensselaer schools as truly open fora for community speech. After combing the history of Rensselaer schools for examples of such speech, defendants could find just a few isolated, irregular talks by groups such as the Boy Scouts, the 4-H Club and a sorority. Moreover, the record is barren of addresses or literary distributions by political groups or religious organizations other than the Gideons. The only exceptions were books entitled *My Favorite Book* and *Young People of the Bible* printed by the Jesus' Love Foundation and a few local merchants. In any event, it is clear that Rensselaer schools—despite the open policy—were not overrun with members of other religions vying for the students' faith. It is dubious whether public schools could or should be used for such purposes, but the salient point here is that Rensselaer school classrooms were not, in fact, open and active fora for competing ideas, contrary to assertions by the Corporation.

One other factual point is worth noting. Defendant contends that as a neutral arbiter of a neutral policy, it could not exclude the Gideons without engaging in content discrimination. Yet by the superintendent's own admission, she did exercise discretion to exclude at least one publication and had every intention of excluding

other groups she found objectionable, including "satanists" and other unnamed organizations offensive to the "moral being" of children. School officials cannot retain discretion over content on the one hand and on the other pretend to be manacled by the dictates of content neutrality.

Defendant offers *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440, for the proposition that, having unlocked its classrooms for public use, it is required to keep the invitation open to all, including the Gideons. In *Widmar*, the Supreme Court held that a university could not exclude a religious organization from after-school use of its facilities after allowing non-religious groups similar access. Yet *Widmar* differs from this case in one critical respect: the religious group in *Widmar* sought access to classrooms after school, the Gideons seek access to classrooms during school. In other words, the organization in *Widmar* sought access to public school *facilities*. The Gideons, by contrast, are not particularly interested in public school classrooms for their physical properties; indeed, it is doubtful that they would seek access to classrooms were they not populated by young children. There was no captive audience in *Widmar*—the classrooms were empty.[6] In Rensselaer schools, however, children have no choice but to sit through the Gideons' presentation and distribution of Bibles. Even if we were to accept defendant's patently unrealistic assertion that the fifth grade students at Rensselaer Central Middle School did not feel coerced to accept and read the Gideon version of the Bible, they were still urged by Gideon representatives to study the Christian Bible. Defendants does not discuss this issue

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[6] The same analysis applies to *Board of Educ. of Westside Community Schools v. By and Through Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191, in which the Supreme Court held that public schools, having opened up classrooms for after-school use by student organizations, could not deny access to a student-led religious group.

in its brief, and at no point in the record does any school official suggest that students were free to leave the room during the Gideons' talk or to skip the school assemblies at which Bibles were distributed.

The only reason the Gideons find schools a more amenable point of solicitation than, say, a church or local mall, is ease of distribution, since all children are compelled by law to attend school and the vast majority attend public schools.[7] That the Gideons seek access to children and not facilities, as in *Widmar*, is self-evident. It is all the more odd, then, to analyze this case in terms of public forum jurisprudence. A designated public forum is a place. Children, of course, are not. Nor does it follow that, having opened a child's mind to one "use," the child's mind must be open to all uses. Even the slightest consideration should yield the conclusion that public school officials entrusted with the education of youngsters can never give up total control over the content of what transpires in classrooms, not least because the children are a captive audience. If they don't like what they see or hear, they are most assuredly not free to get up and leave. This is not a situation like that in *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284, where courthouse visitors could simply avert their eyes from an offensive message displayed on the back of a jacket. We do not expect young children to put cotton in their ears and scrunch up their eyes to avoid overtly religious messages by the state. See *Lee*, —— U.S. at ——-——, 112 S.Ct. at 2659-2660 (student may not be forced as conscientious objector to skip graduation ceremony). Imagine that the Gideons came to Rensselaer schools not once a year but every morning to lead students in prayer.

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[7] It may be that the Gideons also prefer schools because it gives the Bible distribution an official quality. Some students may be confused and think that Bible reading is a homework assignment (though, given what we know about children of middle school age, it is uncertain whether this would make students more or less likely to read the Scripture).

Is there any doubt that such morning prayers would be impermissible under *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, and *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601, no matter that the prayers were led by non-school employees? Recall that, in *Abington*, the Court rejected the daily recitation of the Lord's Prayer even though students could be excused from the classroom.

The analogous decision is not *Widmar* but *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649, in which non-school employees made use of the public schools to further religious doctrine. There the public schools in Champaign, Illinois allowed Jewish, Catholic and Protestant instructors to teach religious classes for a few hours each week during normal school time. Students could choose to sit in on religious classes or to remain in non-religious classes but, having chosen religious instruction, attendance was mandatory. The Court struck down the practice, saying:

> "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State."

Id. at 212, 68 S.Ct. at 465; see also *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (striking down program in which publicly paid teachers taught secular subjects at private religious schools). As in *McCollum*, the Gideons used Rensselaer's tax-supported public schools relying on the state's compulsory public school machinery, to disseminate religious material to fifth graders.

Defendant is also wrong as a matter of law that the First Amendment interest in free expression automat-

ically trumps the First Amendment prohibition on state-sponsored religious activity. The reverse is true in the coercive context of public schools. Even in *Widmar*, where the Supreme Court found that the public university had violated the speech rights of religious organizations by denying them access to after-school classrooms, the Court scrutinized the policy under *Lemon* to make certain it did not violate the Establishment Clause. *Widmar*, 454 U.S. at 270-275, 102 S.Ct. at 274-277. The Court found that opening the university's facilities to religious organizations would have a secular purpose, would not entangle the state with religion, and would not have the primary effect of advancing religion. *Id.* Had these conditions been violated, the Court would have been compelled under *Lemon* to uphold the exclusion of religious groups from university facilities. Similarly, the students, teachers and administrators in *Abington* who wished to recite daily prayers in the classroom had a cogent interest in free expression, but the prohibition against establishing a state religion prevailed. *Abington*, 374 U.S. 203, 83 S.Ct. 1560. First Amendment jurisprudence is densely populated with cases that subordinate free speech rights to Establishment Clause concerns. See, *e.g.*, *McCollum*, 333 U.S. 203, 68 S.Ct. 461 (religious instructors may not teach on public school property); *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261 (students and teachers may not recite a state-composed non-denominational prayer); *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed. 2d (striking down a minute of silence for mediation or voluntary prayer); *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (state may not require posting of Ten Commandments in classroom). In each of these cases, people were kept from exercising very real First Amendment rights to, for example, pray or meditate or proselytize. The conflict between free speech and Establishment Clause interests arises because most religious activity necessarily involves expressive activity, and this expression may be stifled in the government's vigilance to

remain neutral toward religion. See *Abington*, 374 U.S. at 222, 83 S.Ct. at 1571. More to the point, the First Amendment is intended to restrict religious activity not by individuals but by the government. As the Supreme Court said in *Engel*:

> "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."

370 U.S. at 435, 82 S.Ct. at 1269. It is only where individuals seek to observe their religion in ways that unduly involve the government that their expressive rights may be circumscribed. In sum, defendant's attempt to wrench this case out of Establishment Clause jurisprudence must fail. A public school cannot sanitize an endorsement of religion forbidden under the Establishment Clause by also sponsoring non-religious speech.

III.

The First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" applies to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213. Because the Rensselaer Central School Corporation acted with state authority in welcoming the Gideons into public schools, its actions are subject to the dictates of the First Amendment. Under the Establishment Clause, the government may not aid one religion, aid all religions or favor one religion over another. *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 15, 67 S.Ct. 504, 511, 91 L.Ed. 711. As the Supreme Court said in *Zorach v. Clauson*:

> "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and

> State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment, within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter."

343 U.S. 306, 312, 72 S.Ct. 679, 683, 96 L.Ed. 954. For the last twenty years the Supreme Court has accomplished the often excruciating task of keeping government and religion apart by a three-pronged test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745. The so-called *Lemon* test has evolved through a series of cases such that a court must inquire (1) whether the government has the purpose of endorsing religion, (2) whether the effect of the government's action is to endorse religion, and (3) whether the policy or practice fosters an excessive entanglement between government and religion. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592, 109 S.Ct. 3086, 3100, 106 L.Ed.2d 472.

As the briefs in the instant case note, *Lemon* has spawned a great deal of jurisprudential controversy, both on and off the Supreme Court. Last term's case, *Lee v. Weisman*, —— U.S. ——, ——, 112 S.Ct. 2649, 2655, explicitly rejected invitations by many parties, including the United States, to scrap *Lemon*. Although the Court resolved the issues in *Lee* without reference to the three-pronged structure of *Lemon*, which would have ordinarily governed the case, *Lemon* remains the law of the land. See *Sherman v. Community Consolidated School Dist. 21 of Wheeling Tp.*, 980 F.2d 437, 445 (7th Cir.1992) (spec-

ulating on the stability of *Lemon* after *Lee*).[8] The Court said that it need not reconsider *Lemon* because of controlling precedents concerning prayer and religious exercise in primary and secondary schools.[9] *Id.* —— U.S. at ——, 112 S.Ct. at 2655. These same precedents, and in particular *Lee* itself, compel us to reverse the district court's decision sanctioning the Rensselaer Central School Corporation's policy toward the Gideons.

In *Lee*, the Supreme Court held that public school principals may not invite clergy to offer invocation and benediction prayers at formal graduation ceremonies for high schools and middle schools without offending the First Amendment. The Corporation's practice of assisting Gideons in distributing Bibles for non-pedagogical purposes is a far more glaring offense to First Amendment principles than a nonsectarian graduation prayer.

The plaintiff in *Lee* was fourteen years old; most of the recipients of Gideon Bibles in Rensselaer were ten- or eleven-year-old fifth graders. Many cases have focused on the impressionability of students in elementary and secondary schools and the pressure they feel from teachers, administrators and peers. See, *e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 584, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510; *Lee*, —— U.S. at ——, 112 S.Ct. at 2658. Expecting a student troubled by religious exercise to object in this setting is unrealistic. *Abington*, 374 U.S. at 288-293, 83 S.Ct. at 1606-1609 (Brennan, J., concur-

[8] Our recent decision in *Sherman* is otherwise inapplicable. In that case we upheld an Illinois statute allowing, but not mandating, that students recite the Pledge of Allegiance. Our narrow decision in *Sherman* found that in the peculiar circumstances of the Pledge, the words "Under God" did not convert its civic character to a religious one, and so did not trigger Establishment Clause analysis. Because the distribution of Gideon Bibles is unquestionably religious, *Sherman* is irrelevant to this inquiry.

[9] The Court has decided Establishment Clause cases before *Lee* without relying on *Lemon*. See, *e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604.

ring). Indeed, the Supreme Court in *Lee* distinguished *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019, which upheld the practice of beginning legislative sessions with a prayer, because a legislature cannot be compared to a school. *Lee*, —— U.S. at ——, 112 S.Ct. at 2660. If the Supreme Court was concerned about the coercive pressures on fourteen-year-old Deborah Weisman, then we must be even more worried about the pressures on ten- and eleven-year-old fifth graders in Rensselaer such as Joshua Berger.

The invocation and benediction in *Lee* was nonsectarian; the Gideon Bible is unabashedly Christian. In permitting distribution of "The New Testament of Our Lord and Savior Jesus Christ" along with limited excerpts from the Old Testament, the schools affront not only nonreligious people but all those whose faiths, or lack of faith, does not encompass the New Testament. If the government may not promote a nonsectarian prayer in the Judeo-Christian tradition, then surely it may not promote the religious views of one sect. *Everson*, 330 U.S. at 15-16, 67 S.Ct. at 511.

Attendance at the graduation ceremony in *Lee* was voluntary; attendance at Rensselaer schools during the Gideon distribution was mandatory. The defendant in *Lee* argued that students could not feel coerced because they needn't attend commencement exercises at all. Justice Kennedy's opinion found this argument wanting. "Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point * * * for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." —— U.S. at ——, 112 S.Ct. at 2659. Unlike the students in *Lee* who had at least a Hobson's choice, the fifth graders in Rensselaer schools had no choice at all. The record does not indicate whether students were told when the Gideons would address them.

Even if they were, the Constitution cannot tolerate a policy that forces conscientious objectors to skip their lessons, break mandatory attendance rules, and evade truant officers. As noted, Rensselaer schools made no provision to excuse from class students who did not wish to hear the Gideons urge them to study the New Testament. And as the Court said in *Lee*, standing silent during an invocation, "though subtle and indirect, can be as real as any overt compulsion * * * [because] for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer. * * * What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it." *Id.* —— U.S. at ——, 112 S.Ct. at 2658. Rensselaer students had similarly unavailing methods by which to dissent. They could have chosen not to accept a Bible or to return it later, but this form of dissent is insufficient, as the fifth graders were compelled to sit through the Gideons' presentation. Moreover, the act of accepting a Bible in front of other students, with the option of returning it later privately or choosing not to read it, signals accord with the Gideons' beliefs. Presumably, the fifth graders could make a public show of not accepting the Bible, just as students could walk out of the graduation ceremony in *Lee*, or leave during the scriptural reading in *Abington*, but the First Amendment prohibits the government from putting children in this difficult position.

The prayer in *Lee* occurred during an after-school extracurricular event; the Gideons distributed Bibles during instructional time. This distinction is critical because it is likely that youngsters in Rensselaer were confused about whether the Corporation endorsed the Gideons' beliefs. This is so because one does not ordinarily associate public schools with Bible distributions. Graduation exercises, by contrast, are the sort of public gatherings that traditionally commence with a prayer or invocation.

The students in *Lee* had undoubtedly attended other ceremonies outside of school which had been preceded by prayers, and the fact that the schools invited clergy of different faiths made it less likely that the graduates would be uncertain whether the school district agreed with the rabbi's message. The Gideons, however, were the sole religious group ever to address Rensselaer students and their version of the Bible was the only one distributed. That the Gideons made this appearance annually in no way softens the perception that the Corporation endorsed the Gideons' views.

Lee leaves little room for public schools to teach or promote religion, and the distribution of Gideon Bibles cannot fit in these restrictive confines. In so holding, we have taken our lead from *Lee* and not relied on the structure of *Lemon*. However, we note that the Corporation's Gideon policy is also unacceptable under *Lemon's* three-pronged inquiry. A statute or policy that fails to meet all three *Lemon* criteria must be struck down as a violation of the First Amendment. See, *e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489, 86 L.Ed.2d 29 (striking down statute for lacking a secular purpose). For all the reasons stated elsewhere in this opinion, which need not be repeated, the Corporation's policy falls on the wrong side of two *Lemon* prongs. Though we are confident the school district's policy is not aimed at promoting the religious values of the Gideons, it does have the effect of sending a message to an objective observer that the Corporation endorses the Gideons' beliefs, and it entangles the government unnecessarily in religious affairs.

Even though the district court decision was rendered before *Lee*, the district judge erred in finding no Establishment Clause violation under *Lemon*. The district judge opined that permitting the Gideons to distribute Bibles was no more offensive than allowing the Little League into classrooms to talk up the National Pastime. Such a conclusion is tone deaf to the Constitution's man-

date that the government must not establish a state religion, and is utterly insensitive to the special concern about coercive influences on impressionable public school children. Thus we would have decided this case in the same way had the Supreme Court never heard *Lee*. That the Court so forcefully rejected nondenominational commencement prayers in the public school context only strengthens our judgment that the Gideons may not distribute Bibles in Rensselaer public schools during class time for non-pedagogical purposes. The district court's decision is reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

JOSHUA H. BERGER, MORIAH H. BERGER,
by Next Friend ALLEN H. BERGER,
Plaintiffs

v.

RENSSELAER CENTRAL SCHOOL CORPORATION,
Defendant

May 7, 1991

Franklin A. Morse, II, Barnes & Thornburg, South Bend, Indiana, and *Richard A. Waples*, Indiana Civ. Liberties Union, Indianapolis, Indiana, for plaintiffs.

John R. Price, Indianapolis, Indiana, for defendant.

Order on Cross Motions for Summary Judgment

ALLEN SHARP, Chief Judge.

In this action the plaintiffs charge the defendant school corporation with the unconstitutional distribution and dissemination of religious material in violation of the first and fourteenth amendments to the Constitution of the United States. The plaintiffs are elementary school students enrolled in the Rensselaer Central School Corporation, a municipal corporation organized and existing under the laws of the State of Indiana. Pursuant to Fed.R.Civ.P. 17(c), the plaintiffs, by their next friend (their natural father, Allen H. Berger), seek a declara-

tory judgment and preliminary and permanent injunctive relief. Jurisdiction is premised upon 28 U.S.C. §§ 1331 and 1343 [28 USCS §§ 1331 and 1343], and venue is proper pursuant to 28 U.S.C. §§ 94(a)(3) and 1391 [28 USCS §§ 94(a)(3) and 1391].

I.

Both parties have moved for summary judgment under Fed.R.Civ.P. 56. The standards a court employs in reviewing a motion for summary judgment are well-established. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact exists if there is "sufficient evidence favoring the nonmoving party for a [reasonable] jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *See also La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 905 (7th Cir.1990). The movant bears the burden of establishing that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Becker v. Tenenbaum-Hill Associates, Inc.*, 914 F.2d 107, 110 (7th Cir.1990). The movant may meet its burden by showing that "there is an absence of evidence to support the nonmoving party's case." *Id.*, quoting *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554. Any doubt regarding the existence of a genuine issue of material fact must be resolved in favor of the nonmovant. *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513-14.

If the moving party meets its burden, the nonmovant then must present specific facts showing that there is a

genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). The nonmovant cannot rest on mere allegations without significant probative evidence in support of his claim. Accordingly, the nonmovant is required to go beyond the pleadings, affidavits, depositions, answers to interrogatories and admissions on file to designate specific facts showing a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. at 2553. For the following reasons, the court hereby GRANTS defendant's motion for summary judgment.

II.

When the amended complaint was filed in May 1990, the plaintiff Joshua H. Berger ("Joshua") was ten years of age and enrolled as a student in the fifth grade at the Rensselaer Central Middle School, a school owned and operated by the defendant school corporation (Complaint at ¶ 4). The other plaintiff, Moria H. Berger ("Moriah"), was seven years old and a first grader in the Monnett Elementary School, also within the defendant school district (*Id.*). Their complaint challenges a duly adopted policy of the school corporation concerning the distribution, display and exhibition of materials on school premises. In pertinent part, that policy provides:

> 5501.1 In the best interest of the student body, no person, group, or other organization shall distribute, display, or exhibit any book, tract, map, picture, sign, or other publication of any type on the Rensselaer Central School Corporation premises unless authorized by the superintendent and the building principal.
>
> 5501.2 Approval for the distribution, display or exhibit of any materials by any persons, group, or organizations not sponsored by the school must be cleared 72 hours (three (3) school days) in advance of

any distribution, display, or exhibit through the superintendent and the building principal[']s offices. If permitted, the time and location of distribution, display, or exhibit is to be determined by the administration.

. . . .

5501.5 Any person, group, or organization not a part of the Rensselaer Central School [ ] Corporation that does not abide by the above policy, at the request of school officials, shall be considered guilty of trespass and reported to local civil authorities.

5501.6 Questions concerning the distribution of materials on school premises that are not answered by the above policy shall be presented to the Board of School Trustees for clarification.

The plaintiffs allege that the school corporation, acting pursuant to this policy, routinely and unconstitutionally grants permission to religious organizations (especially, the Gideon Society) to distribute religious literature in its elementary and middle schools (Complaint at ¶ 7).[1] Among the religious materials allegedly disbursed were a book entitled "Young People of the Bible" and the Gideon Bible, which is an excerpted compilation from the King James Version of the Christian Holy Bible containing the New Testament and the Old Testament books of Psalms and Proverbs. The school corporation readily acknowledges that representatives of the Gideon organization have annually distributed their Bibles to Rensselaer's fifth grade classrooms "for so many decades that no one can remember when the practice commenced" (Defendant's Memorandum of Law on the Substantive First Amendment Questions at 2).

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[1] It is undisputed that organizations with religious affiliation are but one of the many local groups to have requested and been granted permission to avail themselves of the school corporation's literature-distribution policy. Other such organizations include Tri Kappa, Boy Scouts, Summer Athletics, and 4-H.

The undisputed evidence shows that the Gideons would make one visit per school year to the fifth grade students in the Rensselaer's school system. Although the location of the distribution would vary, sometimes occurring in the classroom, at other times in the gymnasium or in the hallway, the Gideon's routine remained largely the same from year to year. Two Gideon representatives (both men) would come to the school during regular school hours and speak to the students for no longer than a couple of minutes, indicating that Bibles would be made available to students wishing to take a copy. As part of their brief spiel, the representatives would explain who they were, what their organization stood for, and indicate that they had Bibles to distribute free of charge. They would tell a pun that the Bibles were red-covered because they were meant to be read. Then the students would form a queue and file by the two representatives who would hand each student a Bible. Throughout this demonstration, the classroom teacher remained present, although observing silently from another part of the room. At no time would the teacher say anything, or participate in the handing out of Bibles.

At one time, the Gideons would advise students to take the Bibles home to their parents, and if the parents objected, to return the Bibles to their teacher at school. Since then, there had been a school policy of first obtaining parental permission from each child who was to receive a Bible. In recent years, however, permission slips were not used, and there was apparently no other mechanisms used to seek parental permission before students received the Bibles.

According to the complaint, Allen H. Berger first learned of the school's policy regarding the annual distribution of Gideon Bibles in October 1989 (Complaint at ¶ 9). On October 27, 1989, anticipating the impending Bible distribution scheduled for November 2, Berger wrote

to the Superintendent of the School Corporation questioning the constitutionality of the school's practice and requesting that it cease. The superintendent replied on November 17, 1989, that the distribution of Bibles would temporarily be postponed pending the December 1989 meeting of the Board of School Trustees.

At the December meeting the school board voted to reaffirm the earlier practice, the superintendent announcing that " 'our policy concerning distribution, display or exhibit of [religious] materials on school premises remains unchanged.' and that requests for permission to do so would be granted in the same manner as in the past" (Complaint at ¶ 10). Again, in February 1990, during an in-service conference of teachers, the superintendent confirmed that "it was the policy of the School Corporation, receipt of a proper request, to permit the distribution of religious literature and other material by any organization, with the sole exception of 'Satanists' " (Complaint at § 11).

Notwithstanding the defendant's steadfastness in retaining its prior policy, the Gideons never did distribute their Bibles to the classrooms in which Joshua and his contemporaries were fifth grade students at Rensselaer. The school corporation says that Allen H. Berger's frequent objections to the distribution policy resulted in that year's cancellation, with the result that no Gideon Bibles were made available to fifth graders (including Joshua) in the school system during the 1989-90 school year. Because Joshua and his classmates are now sixth graders (to whom the Gideons have never previously distributed their literature in Rensselaer) and because Moriah is only a second grader (at least three years away from receiving a Gideon Bible), the defendants claim that the Bergers lack standing to bring this action. In further support of its motion, the defendant offers the deposition of Gerald Kooy, president of the Jasper County (Indiana) Gideon Society, withdrawing his offer to supply Rens-

selaer school students with Bibles because of the Berger's objections.

The plaintiffs acknowledge that the only religious material Joshua personally received was several years ago when he was in the first grade; although, they claim that other religious literature was recently distributed to some of Joshua's classmates (Plaintiffs' Response to Request for Admissions at 1-4). Joshua claims that as a first grader he received a book entitled "My Farovite Book," published by Good Will, Inc., and distributed in the schools just prior to the Christmas holiday (*Id.* at 1-2). The frontispiece of "My Favorite Book" bears the message "Best Wishes for the Holidays," and states that several local businesses, including the "In Jesus' Love" Foundation, Inc., were responsible for the book's presentation. Its first page reads:

> For this new morning with its light, For rest and shelter of the night, For health and food, for love and friends, For everything that goodness sends, I am thankful.

Plaintiffs refer to this publication as evidence of the school corporation's predilection "to blur the constitutionally protected distinction between secular and religious activity" (*Id.*).

The complaint contains no similar allegation that Joshua's sister (and co-plaintiff) Moriah ever received any religious material from the school. Her avowed nonreceipt of religious literature, in conjunction with Joshua's acknowledgment that he has received no such literature since the first grade and Mr. Kooy's statement rescinding the Gideon Bible distribution, has prompted the school corporation's motion to dismiss this case, pursuant to Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction. The school system argues that this matter fails to present the constitutionally required "case or controversy." Accordingly, before addressing the merits of

plaintiffs' constitutional claim, the court must first consider the justiciability question.

III.

The Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 [28 USCS §§ 2201, 2202], by its terms limits the declaratory remedy to "actual controvers[ies]." The restriction is mandatory, for Article III extends the "judicial Power of the United States" only to actual, ongoing cases and controversies, and not disputes that are hypothetical, academic, or moot. In *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941), recounting Chief Justice Hughes's cryptic test of justiciability, the Supreme Court stated that the inquiry is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 273, 61 S.Ct. at 512, citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-42, 57 S.Ct. 461, 463-65, 81 L.Ed. 617 (1937).

The modern version of this test of justiciability is that a federal court cannot render an advisory opinion, a plaintiff must have standing, and a court cannot hear a case that is not yet ripe or that has become moot. *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §§ 3529-33 (1984) [hereinafter Wright & Miller]. Although the defendant challenges the justiciability of this action at each prong of the reformulated test, the court agrees with the plaintiffs that this case is justiciable, for it presents a concrete dispute in which the plaintiffs have standing, and the cause of action is ripe and not moot. The court considers each prong in turn.

A.

The facts of this case present a substantial controversy that is "definite and concrete," not hypothetical or ab-

stract. Joshua and Moriah Berger remain students in the defendant school system, the stated policy of which permits the distribution of religious literature in its classrooms, despite plaintiffs' objection that the practice violates their constitutional rights under the first amendment. The court finds that the defendant's current policy, affecting these plaintiffs as currently enrolled students subject to that policy, presents an actual controversy capable of review in this court.

B.

The concept of standing focuses on the question whether the plaintiff is the proper litigant to bring suit. The emphasis is thus on the party and not the claim itself. The Supreme Court has articulated three standing requirements that a plaintiff must satisfy to bring his suit in federal court: (1) he must personally have suffered an actual or threatened injury caused by the defendant's allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's challenged conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (citations omitted); *see also Simmons v. I.C.C.*, 900 F.2d 1023, 1026 (7th Cir. 1990).

With respect to the first requirement—that the plaintiff suffer an actual or threatened injury—the defendant has emphasized its intention to retain the policy permitting distribution of such materials, thereby subjecting both plaintiffs to the prospect of future constitutional injury.

Plaintiffs readily satisfy the second requirement also. Without question, plaintiffs' asserted injury is a direct "but for" cause of the school's corporation's policy. Were it not for the policy and the school's approval of the dis-

tribution of religious literature, there would be no constitutional injury.

Similarly, the complained-of injury is capable of total redress by a favorable decision in this court. Granting plaintiffs' requests for relief would remedy their alleged injury by prohibiting and declaring illegal the defendant's further distribution of religious materials. Plaintiffs thus have standing to maintain this lawsuit.

C.

The ripeness doctrine is another principle of justiciability. It can be viewed as a time dimension of standing, one of maturity to bring suit. It asks, in effect, whether there is yet any need for the court to act. A court may find that a case is not ripe for decision if the asserted injury is too remote or contingent to warrant the present adjudication. *See* Wright & Miller, § 3532.1 at 130.

The Supreme Court has often stated that the test of ripeness turns on the functional considerations of " 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' " *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Com'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 1720, 75 L.Ed.2d 752 (1983), quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). *See also Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820, 823 (7th Cir.1990).

The court holds that this matter is ripe for adjudication under the two *Abbott* factors. First, the issues presented are fit for judicial decision because the question presented is almost purely legal. There is little factual dispute about what transpired, or given the school corporation's adherence to its distribution policy, what is likely to transpire. All the court need decide, therefore, is the legal consequence of undisputed factual events that

are well document in this record. And even as to future events, the likelihood of "repeating history" is high given the tradition and regularity of the practice. Consequently, the passage of additional time will not substantially alter the factual record.

Second, because the asserted injury involves the denial of first amendment liberties, withholding review of this matter would work an undue hardship on plaintiffs. *See, e.g., Planned Parenthood Ass'n of Chicago Area v. Kempiners*, 700 F.2d 1115, 1122 (7th Cir. 1983) (Cudahy, J.) ("Requirements of ripeness are less strictly construed in the first amendment context. . . .") (citations omitted); *see also Spartacus Youth League v. Board of Trustees of Illinois Industrial University*, 502 F.Supp. 789, 796-97 (N.D.Ill.1980) ("In the First Amendment area, however, a somewhat relaxed standard . . . is applicable.").

D.

The mootness doctrine is grounded in the same principles of justiciability as standing and ripeness. Like ripeness, mootness is a temporal concept, involving not the maturity of the lawsuit, but its continuing vitality. A case is moot, and therefore nonjusticiable, when it is no longer "ongoing," or where the court is no longer capable of "affect[ing] the rights of litigants in the case before [it]." *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S.Ct. 1249, 1253, 108 L.Ed.2d 400 (1990) citation omitted). Moreover, the requirement of Article III mandates that a federal court have jurisdiction throughout the litigation, not simply when suit was filed. "The parties must continue to have a 'personal stake in the outcome' of the lawsuit" (citations omitted). Id. 110 S.Ct. at 1254.

The school corporation argues that this lawsuit is moot for a couple of reasons. First, it claims that because neither plaintiff is currrently in the fifth grade, none has a "personal stake" in the controversy. Second, the

defendant maintains that Mr. Kooy's withdrawal of his offer to supply Gideon Bibles to the Rensselaer schools prevents any future constitutional injury from recurring. Both arguments are without merit because the court finds that two exceptions to the mootness doctrine apply to these facts.

The first exception to the mootness doctrine—the "capable of repetition yet evading review" exception—recognizes that some controversies are so short-lived that the total injury will occur before there is an opportunity for full judicial review. Even if the fallout from the constitutional injury is, as defendant claims, limited to students in the fifth grade, a nine-month school year will almost never be sufficiently long even to file pleadings and conduct discovery, let alone fully litigate the merits. In *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Supreme Court held that the case remained justiciable even though the petitioner was no longer pregnant. The Court said that was because the normal nine-month pregnancy period made the case "capable of repetition, yet evading review." *Id.* at 124, 93 S.Ct. at 712 (citations omitted). The same reasoning applies in this case to salvage its justiciability.

But this case is justiciable for another reason also, viz., the application of the second mootness exception—the doctrine of voluntary cessation. The Supreme Court has held that "voluntary cessation of allegedly illegal conduct . . . does not make the case moot" (citations omitted). *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). That is because the defendant is free to return to his old ways[].

> This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. . . . The courts

> have rightly refused to grant defendants such a powerful weapon against public law enforcement.

Id. (citations omitted). Thus, where a defendant has voluntarily discontinued the challenged conduct, the case will not be deemed moot unless the defendant demonstrates that "there is no reasonable expectation that the wrong will be repeated" (citation omitted). *Id.* at 633, 73 S.Ct. at 897. The school corporation has not made the required showing. It is not enough to plead that the Gideons have said they will not return with their Bibles to the Rensselaer schools. For the distribution of Bibles is not the only asserted constitutional injury. Objections also have been leveled against other kinds of religious material. Indeed, the actual source of the asserted injury lies not with the groups that wish to disseminate their literature but with the school corporation that ultimately grants their requests. Because the school system has indicated that its distribution policy remains unchanged and will continue, its voluntary cessation of the allegedly illegal activity cannot serve to render this case moot. Accordingly, having thus determined that this matter is justiciable, the court proceeds to address the merits of plaintiff's constitutional claim.

IV.

The plaintiffs allege that the school corporation's policy allowing the distribution of religious literature in its classrooms violates the establishment clause of the first amendment. The court briefly reviews the Supreme Court's jurisprudence in this area and applies the relevant precedent to these facts.

A.

The opening words of the Bill of Rights are those of the establishment clause: "Congress shall make no law respecting an establishment of religion. . . ." Although the establishment clause by its terms applies only to fed-

eral government action, the Court has determined that the fourteenth amendment incorporates its provisions to encompass state action also. *Everson v. Board of Education*, 330 U.S. 1, 8, 14-15, 67 S.Ct. 504, 507, 510-11, 91 L.Ed. 711 (1947).

Everson is the Court's seminal establishment clause case. In addition to applying the clause to state (as well as federal) action, *Everson* outlined what would become the core establishment clause principle: strict government neutrality toward religion. "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" *Id.* at 16, 67 S.Ct. at 512 (citation omitted).

Everson's doctrine of separation has evolved over the years into a three-pronged test for determining whether governmental action will survive an establishment clause challenge. As the Court stated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive governmental entanglement with religion'" (citations omitted). With only limited revision, the so-called *Lemon* test today remains the constitutionally relevant analysis for establishment clause challenges.

The revision has occurred in the form of a *Lemon*-modified endorsement test. The first suggestion of an endorsement analysis appeared in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), the Pawtucket Rhode Island, creche case. The following year, in *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), the moment-of-silence case, the Court first referred to an endorsement inquiry in a majority opinion. Justice Stevens wrote the majority opinion and began

his analysis with the venerable *Lemon* test. "In applying the purpose test," wrote Stevens, "it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" *Id.* at 56, 105 S.Ct. at 2489 (quoting *Lynch*, 465 U.S. at 690, 104 S.Ct. at 1368 (O'Connor, J., concurring)). He announced the Court's conclusion also in endorsement terms: "The legislature enacted [the statute] . . . for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday. . . . Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Wallace*, 472 U.S. at 60, 105 S.Ct. at 2491.

Concurring in *Wallace*, Justice O'Connor also addressed the purpose prong in endorsement terms, as had Justice Stevens, but she too framed the effect prong in the language of the endorsement test. As to the effect prong, O'Connor offered the same endorsement analysis she had recommended in *Lynch*: "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in the public schools." *Id.* at 76, 105 S.Ct. at 2500 (citations omitted).

Just a month after its decision in *Wallace*, the Court decided *Grand Rapids School District v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), where the Court invalidated government programs under which public teachers taught secular subjects at private religious schools. Justice Brennan wrote the Court's majority opinion, readily acknowledging the "manifestly secular" purpose of these programs, and focusing his analysis on the "effects" prong instead. Brennan found that the government programs could not withstand constitutional scrutiny because they "provide[d] a crucial symbolic link between government and religion." *Id.* at 385, 105 S.Ct. at 3223. He indicated that "an important concern of the effects test is whether the symbolic union of church and

state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices." *Id.* at 390, 105 S.Ct. at 3225. Brennan continued:

> The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. The symbolism of a union between church and state is more likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environmental as much as of free and voluntary choice.

Id. (citations omitted).

In *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), the creche and menorah case, Justice Blackmun reaffirmed that since *Lynch* a majority of the Court has viewed the endorsement inquiry as the proper analytical device to evaluate establishment clause challenges. *Id.* 109 S. Ct. at 3103 (quoting *Lynch and Grand Rapids*). And just last Term in *Board of Educ. of Westside Community Schools v. Mergens*, —— U.S. ——, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), a majority of the Court again embraced the endorsement method. *See id.* 110 S.Ct. at 2370-73, 2378-83. Only Justices Kennedy and Scalia expressly disavowed this approach, indicating that the "word endorsement has insufficient content to be dispositive." *Id.* 110 S.Ct. at 2377-78.

The evolution of the traditional three-pronged *Lemon* test into a *Lemon*-modified endorsement test means that a court reviewing the constitutionality of a governmental practice under the establishment clause must now inquire: first, whether the government's actual purpose in performing or permitting the challenged action is to endorse

or disapprove of religion; second, whether the governmental action is sufficiently likely to be perceived by an objective or reasonable observer as an endorsement or disapproval of religion; and third, whether the action fosters an excessive entanglement between government and religion. For the governmental action to withstand an establishment clause challenge, it must satisfy each of the three factors outlined above. Having thus reviewed the Supreme Court's modern establishment clause jurisprudence, the court applies the endorsement test to these facts.

B.

The first inquiry focuses on whether there is a secular purpose to the school corporation's policy permitting the distribution of Gideon Bibles on school premises during school hours. The policy on its face it content neutral; it does not mention a supreme being, the holy scripture, or make any other religious reference. Nevertheless, the Bergers insist that the practice of making the Bibles available to Rensselaer school children indicates that the defendant's actual purpose was to endorse Christianity. The court disagrees. Heeding Justice O'Connor's deferential approach,[2] the court finds that the school's policy was motivated by at least one of many possible secular concerns. One could view the practice as simply a trespass regulation controlling the access of non-school persons or groups onto the school campus during school hours. Or it could be viewed as a program to make available to students locally generated literature reflecting many aspects of their community—civic, athletic, historic, as well as religious. In any event, the court finds

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[2] "Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of a religious belief 'was and is the law's reason for existence.'" *Wallace v. Jaffree*, 472 U.S. at 75, 105 S.Ct. at 2499 (O'Connor, J., concurring in judgment) (citation omitted). Under this reasoning the distribution policy at issue here should be found to have a secular purpose in light of its text expressing no religious purpose.

that the defendant's policy satisfies the first *Lemon* prong because its purpose was not wholly religious and may have been wholly secular.

Next, *Lemon's* effects prong asks whether the school's distribution policy would likely be perceived by a reasonable observer as endorsing Chrisianity. Put differently, the inquiry can be framed as whether the policy would send a message to a non-Christian that he is an outsider. The court finds that no observer, Christian adherent or not, could reasonably view the Gideon organization's distribution of Bibles in the Rensselaer schools as an endorsement of the Christian faith. Permitting the local Gideons to circulate their literature in public school classrooms is no more an endorsement of Christianity than allowing little league baseball to disseminate its materials endorses the national pastime. Nor would a reasonable observer perceive a similar leaflet campaign by the American Civil Liberties Union or the Anti-Defamation League of B'nai B'rith as an endorsement of the respective views of these organizations.

This court is mindful of the Supreme Court's caveat that the judiciary be especially vigilant when reviewing religious messages aimed at young school children. Children of tender years are more likely to misapprehend the character and content of the message and infer a symbolic union between church and state when none is intended or existent. But the Court has also made clear that the context in which governmental conduct occurs can be dispositive of an establishment clause issue. *Compare Stone v. Graham*, 449 U.S. 39, 42, 101 S.Ct. 192, 194, 66 L.Ed.2d 199 (1980) (per curiam) (public school use of Ten Commandments for inspirational purposes held unconstitutional), *with Abington School District v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963) (religion and Bible studied in purely pedagogic manner held constitutional). Thus, where the Bible is used in a purely academic manner, there is no establishment clause violation, even when a public funded teacher

leads such instruction during regular hours on school property.

In this case, where the Bibles emanated not from the teacher but from a private actor, who did not engage in a proselytizing recitation of scripture and verse, but merely invited each student to take a Bible and read it, the court finds that no message of official endorsement resulted. The defendant's policy offering school students exposure to the many facets of thier local community (including the religious) does not constitute the school's imprimatur as to each such facet.

Were the plaintiffs to have their way, the Rensselaer school system would exclude only religious groups from access to its classrooms. All other groups seeking permission to distribute their literature would be welcomed. In such a case, could an observer conclude other than that the purpose of the exclusion was to *disapprove* of religion? Such a purpose would be manifestly hostile to religion generally and thus run afoul of the first *Lemon* prong. The school system's policy permitting the dissemination of literature of many local groups, whether of a religious affiliation or not, thus cannot reasonably be said to be an endorsement of any particular secular or religious viewpoint.

Finally, the third *Lemon* prong addresses whether the governmental action fosters an excessive entanglement with religion. The prohibition against excessive church-state entanglement reflects the principle that secular and religious realms must not unduly overlap, else government would be destroyed and religion degraded. *Engel v. Vitale*, 370 U.S. 421, 431, 82 S.Ct. 1261, 1267, 8 L.Ed.2d 601 (1962). The Bergers argue that in three respects the distribution of Bibles constituted an impermissible entanglement of the school in Gideon's affairs: first, the distribution of Bibles had become an annual school event; second, the principal of the Rennsselaer Middle School (where the fifth graders are housed) once

had been a special guest at a Gideon banquet as a "thank-you" for allowing its representatives to visit the school; and, third, objecting parents whose children had received Bibles were instructed to return them to their children's teachers. The court finds that the described school involvement with the Gideon's distribution of Bibles is merely incidental and does not rise to the level of an "excessive entanglement" with religion.

Unlike in *Lemon*, the school's inconsequential involvement here does not amount to a "comprehensive, discriminating, and continuing state surveillance" of the challenged religious activity. *Lemon*, 403 U.S. at 619, 91 S.Ct. at 2114. The Rensselaer school system does not engage in the day-to-day administration of religion as was condemned in *Lemon* and its progeny. The Gideons' visits have occurred but once a school year, and then only for a few minutes at a time. During these periods the teachers remain silent and out of the way, staying in the classroom merely in a custodial capacity to ensure good student behavior. The Gideons provide the entire funding for the Bibles they hand out, and they alone are responsible for the presentation. Under these circumstances the court cannot conclude that the school's involvement is so great as to amount to an excessive entanglement with religion in violation of the first amendment's establishment clause.

V.

Although the distribution of religious literature in the public schools necessarily presents close and difficult questions of constitutional law, the court finds that the regime in Rensselaer under which these materials are made available to students does not run afoul of the first amendment's establishment clause.

For all of the foregoing reasons, the court concludes that plaintiffs' action for declaratory and injunctive relief is not well-founded and accordingly their request for relief is DENIED. The defendant's motion for summary judgment is GRANTED. SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

February 17, 1993

Before
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Senior Circuit Judge*
HON. FRANK A. KAUFMAN, *Senior District Judge* *

No. 91-2279

JOSHUA H. BERGER and MORIAH BERGER,
b/n/f ALLEN H. BERGER,
Plaintiffs-Appellants,

vs.

RENSSELAER CENTRAL SCHOOL CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, Lafayette Division
No. L 90-19—Allen Sharp, *Chief Judge*

ORDER

Our slip opinion of January 5, 1993, is hereby amended in the following respects:

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* The Honorable Frank A. Kaufman, Senior District Judge in the District of Maryland, is sitting by designation.

At the bottom of page 6 and the top of page 7 in the main text, remove the words "lined up and" so that the sentence will read, "After the presentation, the students were instructed to take a Bible from a stack of Bibles placed on a table or desk."

On page 9, the second full paragraph shall begin, "This approach suffers from two failings: it distorts the facts and misconstrues the law."

On page 11, line 7, replace the reference to Jews, Muslims, etc., so that the sentence will read, "In any event, it is clear that Rensselaer schools—despite the open policy—were not overrun with members of other religions vying for the students' faith."

On page 12, beginning at line 10, change the phrase "they were still subjected to a pitch by Gideon representatives urging them to study the Christian Bible" to "they were still urged by Gideon representatives to study the Christian Bible."

On page 15, in the third-from-last line of the carry-over paragraph, replace the word "sanctify" with the word "sanitize."

On page 20, second-from-last line, insert "during class time" after "public schools."

On January 19, 1993, defendant-appellee filed a petition for rehearing with suggestion for rehearing *en banc*, and an answer was filed by plaintiffs-appellants on February 3, 1993. All of the judges on the original panel have voted to deny the petition and none of the active judges[1] has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

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[1] Circuit Judge Michael S. Kanne did not participate in consideration of the suggestion for rehearing *en banc*.

APPENDIX D

RENSSELAER CENTRAL SCHOOL CORPORATION

5500 Distribution, Display or Exhibitation on School Property

5501 Distribution, display or exhibit of materials on school premises shall be conducted as follows:

5501.1 In the best interest of the student body, no person, group, or other organization shall distribute, display, or exhibit any book, tract, map, picture, sign, or other publication of any type on the Rensselaer Central School Corporation premises unless authorized by the superintendent and the building principal.

5501.2 Approval for the distribution, display, or exhibit of any materials by any persons, group, or organizations not sponsored by the school must be cleared 72 hours (three (3) school days) in advance of any distribution, display, or exhibit through the superintendent and the building principals offices. If permitted, the time and location of distribution, display, or exhibit is to be determined by the administration.

5501.3 Rensselaer Central students who wish to distribute any information other than routine classroom or school related materials or school sponsored publications are subject to all provisions as stated immediately above.

5501.4 Rensselaer Central students who do not abide by the above regulations may be suspended from school by the building principal, and re-admitted only after stu-

dent and parental conference with the administration. Reoccurrance of disrespect for the above policy may result in a student being permanently expelled by the Board of School Trustees.

5501.5 Any person, group, or organization not a part of the Rensselaer Central Schools Corporation that does not abide by the above policy, at the request of the school officials, shall be considered guilty of trespass and reported to local civil authorities.

5501.6 Questions concerning the distribution of materials on school premises that are not answered by the above policy shall be presented to the Board of School Trustees for clarification.